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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 867

LELAND A. CHAPPELLE, *Petitioner*

v.

DUDLEY C. SHARP, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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LELAND A. CHAPPELLE, *Petitioner*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice of the United States And the Associate Justices of the Supreme Court of the United States:

Leland A. Chappelle, petitioner herein, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia affirming the dismissal of petitioner's cause.

OPINIONS BELOW

The District Court wrote no opinion or findings of fact. (J. A. 9).* The judgment of the Court of Appeals has not been officially reported, but is printed as Appendix B to this petition, *infra*, p. 3a.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on November 22, 1961. Appellant's petition for rehearing was denied on January 15, 1962. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

In the opinion of petitioner, the questions presented in this case are:

1. Under the Federal Rules of Civil Procedure, may the defense of laches be raised by a motion to dismiss for failure to state a claim upon which relief can be granted?

2. Does the time lapse of thirty-four and one-half months, per se, that is, without any showing of prejudice to result from a change of circumstances, constitute laches, so as to bar in its entirety a civil action by a wrongfully discharged government employee seeking reinstatement, a clearing of his employment records, and lost pay?

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* Page 9 of Joint Appendix of Brief for Appellant in Court of Appeals.

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves questions relating to:

1. Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure, 28 U. S. C., F. R. C. P. 8(c) and 12(b), which are printed in Appendix A, *infra*, p. 1a.

2. The Fifth Amendment to the Constitution of the United States, which is also printed in Appendix A, *infra*, p. 2a.

STATEMENT OF THE CASE

This case comes to this Court from the affirmance of the summary judgment dismissing the complaint in the trial court. No answer was filed on behalf of the defendants, no testimony was introduced, and the only documentary evidence introduced was the affidavit submitted by defendants to establish the date on which plaintiff had exhausted his administrative remedies. The statements which follow are based, therefore, solely on the facts pleaded in the complaint and the date established by the affidavit.

Petitioner is a United States citizen and an experienced firefighter who was employed by the Department of the Air Force at Anderson Air Force Base, Guam. He was a Schedule A employee (Excepted Appointment) who had served his probationary period and held a permanent status, which was within Tenure Group I for reduction in force purposes. His civil service grade was GS-081-10, S/4.

On February 15, 1955, petitioner was removed for cause from his job. That removal was unjustified and was perpetrated by actions contrary to and proceedings not in accordance with the applicable regulations of the Air Force and the Civil Service Commission.

Following several denials by intermediate appeal authorities, petitioner's removal was reviewed by the Grievance Review Committee of the Office of the Secretary of the Air Force; and, based upon that review, the Secretary ordered that petitioner be restored to his position or to one of "like seniority, status and pay".

That restoration order was issued under date of December 20, 1956, but no action was taken by the local personnel office to reinstate petitioner until February 26, 1957, when he was notified that he was being given a "Temporary Appointment" in a job in the civil service grade of GS-081-11, S/2. This position was in Tenure Group III for reduction in force purposes.

That purported restoration obviously was not a compliance with the order of the Secretary that petitioner be restored to a "position of like seniority, status, and pay". It was temporary rather than permanent; it was in grade 11 step 2 rather than in grade 10 step 4; and it was within Tenure Group III rather than Tenure Group I for reduction in force purposes. And on February 27, 1957, the very next day after the purported notice of restoration, petitioner was served with notice that it was necessary to "separate you by reduction in force because of a required reduction in personnel".

Petitioner was separated pursuant to that notice and he remains so separated. He diligently pursued his avenues for administrative relief and exhausted them on August 1, 1957. During the almost two and one-half years in which he was seeking to recover his job and status by administrative actions, and since the final administrative denial therein, petitioner remained, and is now, a resident of the Island of Guam. He ob-

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tained other work as a means of earning a livelihood but was unable to find a position comparable in pay and other respects to that which had been taken from him.

On June 17, 1960, petitioner filed action in the United States District Court for the District of Columbia seeking equitable reliefs in the forms of a declaratory judgment rendering null and void the administrative actions which had deprived him of his job and a mandatory injunction ordering a clearing of his employment records a proper job reinstatement with accrued seniority and status, and an award for monetary loss. Federal jurisdiction was founded upon the Act of June 25, 1948, c. 646; 62 Stat. 930; U.S.C. Title 28, sec. 1331, 1332.

Respondents, without having answered the complaint, moved to dismiss for failure to state a claim upon which relief could be granted. The sole grounds relied upon to support the motion was the defense of laches, and the only evidence introduced was an exhibit establishing the date on which petitioner had exhausted his administrative remedies.

Petitioner opposed the motion on the grounds that, under Rule 8(c) of the Federal Rules of Civil Procedure, the defense of laches may not be raised in that manner; and that even if it could be so raised, there were not sufficient facts before the court to sustain the defense.

The district court treated the motion as a motion for summary judgment pursuant to Rules 12(b) and 56, F.R.C.P., and entered summary judgment dismissing the complaint.

Petitioner appealed, and the United States Court of Appeals for the District of Columbia affirmed on

the grounds that the time interval of thirty-four and one-half months between the date of exhaustion of the administrative remedies and the date of filing of the civil action constituted laches and, therefore, petitioner's claim was barred.

REASONS FOR GRANTING THE WRIT

By affirming the District Court's dismissal of petitioner's complaint, the Court of Appeals has sustained, in the process by which petitioner has been and is being deprived of his job and federal employee status, two additional departures from established law and the due process of law to which petitioner is entitled.

The actions of the local personnel office is patently failing to comply with the Secretary's restoration order, and in holding up any restoration action for a period in excess of two months for the obvious purpose of setting the stage for the reduction in force action which was to follow within the twenty-four hours immediately following the purported restoration, were gross, arbitrary, and discriminatory deprivations of petitioner's rights to his job and status. Those rights are guaranteed protection by the "due process" clause of the Fifth Amendment of the Constitution of the United States, and petitioner is entitled to effect that protection through the courts (*Wieman* v. *Uppdegraft,* 344 U.S. 183, 192).

When petitioner took his case to the courts, the courts below refused to require that the respondents follow the rules of procedure under which cases are to be heard and in accordance with which petitioner attempted to prosecute his case. Those rules have been enacted as laws of the United States and the refusal by the courts to enforce them led to the dismissal of peti-

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tioner's case in violation of law and in the absence of the "due process" contemplated and assured by them.

In ruling upon the issue of laches which was treated as raised in petitioner's case, the courts below also departed from the law as established by prior decisions of this Court. By applying incorrect rules of law, those courts have concluded that petitioner is not entitled to any relief and have refused to hear his case.

Decision Below in Conflict With Prior Decisions of That Same Court and Contrary to the Rules of Practice Established By This Court

Without having answered to petitioner's complaint in the trial court, respondents moved to have the complaint dismissed for failure to state a claim upon which relief could be granted. In their argument in support of that motion, respondents relied solely upon the defense of laches. No deficiency in the cause stated in the complaint was alleged. It is clear, therefore, that it was not a failure to state a claim that respondents wished to put into issue—it was rather a defense to the claim stated.

But Rule 8(c) of the Federal Rules of Civil Procedure provides in pertinent part that:

> 8 . . . (c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, . . ., . . ., laches, . . ., . . ., and any other matter constituting an avoidance or affirmative defense.

And Rule 12(b) then requires that:

> . . . Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required. . . .

The Rules are clear, therefore, in their requirement that in order to raise the affirmative defense of laches against a claim made in a complaint, said defense must be asserted in the answer thereto, and may not be raised by a motion to dismiss. (See *Riley* v. *Titus,* 89 U.S. App. D.C. 79, 190 F. 2d 653, 656, cert. den., 342 U.S. 855, 72 S. Ct. 82, 96, L. Ed. 644, reh. den., 342 U.S. 889, 72 S. Ct. 179, 96 L. Ed. 667; *Callaway* v. *Hamilton Nat. Bk. of Wash.,* 90 U.S. App. D.C. 228, 195 F. 2d 556, 562).

The reasonableness and desirability of such a rule is made clear when we bear in mind that laches is an equitable defense and, as such, can be determined and applied or rejected only after a weighing of the equities of the case in the light of all relevant facts. (*Hammond* v. *Hopkins,* 143 U.S. 224, 250, 12 S. Ct. 418, 36 L. Ed. 134; *Pfister* v. *Cow Gulch Oil Co.,* 189 F. 2d 311, cert. den., 342 U.S. 887, 72 S. Ct. 177, 96 L. Ed. 665). Those same facts will of necessity be relied upon and interwoven with other facts to be relied upon in the presentation or defense of the other issues of the case, and to allow such an expansive and all-embracing issue as laches to be singled out for a separate determination would be tantamount to allowing the party raising it to put the party against whom it is asserted to the intolerable task of a multiple proof of his claim—once to overcome the assertion of laches, and again on the trial of the merits.

The foregoing considerations apply with unusual force and vigor in the case now before the Court because the petitioner, although a native of the United States, is and for some time has been a resident of the Island of Guam, and to require multiple proofs in this case would work peculiar prejudice and hardship upon him.

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That the Rules do not contemplate that the defense of laches may be raised by motion is further evidenced by the fact that Rule 12(b) specifically enumerates certain defenses which, as exceptions to the general rule may be made by motion; but laches is not included among those exceptions. And again, the apparent reason is that those exceptions consist of defenses technical in nature and factually unrelated to the general issues. The issues involved in the determination of the defenses of lack of jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process, as examples of those excepted defenses, will turn on facts independent of and unrelated to the facts needed in the determination of substantive issues of the case itself. But that is not the situation with the issue of laches, since, as has been pointed out, the determination thereof requires a weighing and balancing of the equities of the case.

It is clear, therefore, that a party's cause should not be tested against the defense of laches solely on the facts alleged in the complaint and the time interval involved. In federal pleading a party is not required to anticipate and plead against the defense of laches. He should not include such matter in his complaint and he is entitled to have the defendant plead and prove all the essential elements of the defense.

Petitioner relied upon this point in the trial court but was overruled. He urged it again before the Court of Appeals but that Court ignored it in its decision. Petitioner asked for a rehearing for the reason that no consideration was given to it in the decision but rehearing was denied.

In refusing to address itself to the question, the Court of Appeals silently has refused to follow the rule

which it had laid down in the *Riley* and *Gallaway* cases, *supra.*

The federal rules of civil procedure have the force and effect of statutes. (*Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 7, 13; *American Federation of Musicians* v. *Stein,* 213 F. 2d 679, cert. den. 348 U.S. 873.) As such they are controlling of the procedure to be followed in the federal courts, and the court is without authority to vary that procedure to the clear prejudice of a litigant.

Even If Procedure Below Was Acceptable, Decision Below Is Contrary to Law of Cases From This Court

The only fact offered by respondents in support of their motion to dismiss on the ground of laches was the fact that approximately thirty-four (34) months had elapsed between the date of petitioner's exhaustion of his administrative remedies and the date on which he filed suit.

But it is firmly settled law that a time delay alone does not constitute laches. As this Court said in *Gallihe*r v. *Cadwell,* 145 U.S. 368, 373, 12 S. Ct. 873, 36 L. Ed. 738:

> . . . laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation of the property of the parties.

Before the doctrine of laches may be applied, therefore, it must have been shown that the enforcement of the asserted right would work an injustice upon the party pleading the laches (See: *Mount Vernon Savings Bank* v. *Wardman,* 84 U.S. App. D.C. 343, 173 F. 2d

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648; *Hoehn* v. *Crews,* 144 F. 2d 655, 671, cert. den., 323 U.S. 773, 65 S. Ct. 135, 89 L. Ed. 618, reh. den., 323 U.S. 817, 65 S. Ct. 312, 89 L. Ed. 649, affm'd, 324 U.S. 200, 65 S. Ct. 600, 89 L. Ed. 870).

The respondents in this case put in no evidence tending to establish that they would be prejudiced by a granting of the reliefs sought.

The courts below, however, dismissed petitioner's complaint upon respondents' showing of the single fact that there had been a time lapse of approximately thirty-four (34) months prior to his institution of the suit. In so doing, the courts treated that period of delay as laches per se as to the entire complaint.

But the rule of the *Galliher* case, *supra,* as quoted and followed in the case of *Sis* v. *Boarman,* 11 App. D.C. 116, 123; and as reaffirmed by this Court in *Holmberg* v. *Armbrecht,* 327 U.S. 392, 396, 66 S. Ct. 582, 90 L. Ed. 743, establishes beyond question the fact that the essential ingredient of laches is prejudice resulting from some change of condition on the part of one of the parties.

It is clear, therefore, that a time lapse of thirty-four (34) months does not constitute laches per se, and the dismissal of the complaint on the basis of respondents' showing of that fact alone was contrary to law and prejudicial to petitioner's rights.

In its decision the Court of Appeals held that the law on the point was established by the Court in *Arant* v. *Lane,* 249 U.S. 367, 372. There this Court said:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistakes as to the facts of his case, obvious considerations of public policy

> make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified, the government may be disturbed as little as possible, and that two salaries shall not be paid for a single service.

But the public policy considerations which were controlling in that case are not present in this case. The factual situations of the two cases are significantly different.

In this case the petitioner was purportedly reinstated on one day and then removed by reduction in force on the next day. It is clear that he never occupied a job or position that has been filled by another employee. It is equally clear that the government would be no more disturbed by being required to properly reinstate him now than it would have been if it had been required to do so at an earlier time.

It is possible that he might not be entitled to lost pay during the *entire* period that lapsed before he brought suit, but that is a question which the trial court should pass upon after hearing the facts relating to the delay. The complaint should not have been dismissed in the absence of respondents' establishment beyond doubt that petitioner could not prove any set of circumstances entitling him to any of the reliefs prayed for. *Conley* v. *Gibson,* 355 U.S. 41, 46. The defense of laches is a creature of equity, intended to protect a defendant who has been prejudiced by a delay in bringing action (*Galliher* v. *Cadwell, supra*) and as such it should not be treated as a device for punishing a delinquent plaintiff when some or all of the relief sought can be granted without prejudice to the defendant (See: *Swart* v. *Johnson,* 48 Cal. App. 2d

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824, 120 P. 2d 699; *Brewer* v. *Simpson,* 53 Cal. 2d 567, 349 P. 2d 289).

Case Presents Question of Sufficient Importance to Warrant This Court's Attention

This case presents questions of paramount public interest and importance. Petitioner has been deprived of his federal employment and status by arbitrary and discriminatory conduct on the part of certain government officials. He has sought the aid of the courts but has been denied the right to have his case heard according to the laws setting forth the rules of procedure for the hearing of cases. And finally, he has had his cause dismissed without regard to and in violation of the rule of law on the substantive question raised.

The aforementioned violations of petitioner's individual liberties and rights is sufficient to bring the matter before this Court and to cause the Court to extend its arm in protection of those rights. But even more is at stake. The excellence and integrity of a government are tested and judged according to the concern it manifests for the rights of its subjects. Arbitrary and discriminatory tactics are violative and destructive of such qualities, and such tactics have no place within our governmental departments or system. If we are to expect others to follow our lead, our standards certainly must be higher than that.

If the fundamental and constitutionally guaranteed rights of the citizens and the virtues of our system of government are to be fostered and safeguarded, petitioner's case should be heard.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

Statutes and Constitutional Provisions Involved

28 U.S.C., F.R.C.P. 8(c) and 12(b):

Rule 8(c), General Rules of Pleading—Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

Rule 12(b), Defenses and Objections—How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one

for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Constitution of United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16310

LELAND A. CHAPPELLE, *Appellant*

v.

DUDLEY C. SHARP, Secretary of the Department of the Air Force, et al., *Appellees*

Appeal from the United States District Court for the District of Columbia

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Decided November 22, 1961

Mr. Sommers T. Brown, with whom *Mr. Paul M. Rhodes* was on the brief, for appellant.

Mr. Nathan J. Paulson, Assistant United States Attorney, for appellees. *Mr. David C. Acheson*, United States Attorney, *Mr. Charles T. Duncan*, Principal Assistant United States Attorney, and *Miss Doris H. Spangenburg*, Assistant United States Attorney, were on the brief for appellees.

Before PRETTYMAN, WASHINGTON and BURGER, *Circuit Judges.*

PER CURIAM: This is a civil action in which the plaintiff sought reinstatement in a Civil Service position in Federal Government employ, expungement from the employment records of all references to his removal, and back pay for the period of his unemployment. His appeal to the Civil Service Commission was adversely decided on

August 1, 1957. He filed his complaint June 17, 1960. This was thirty-four and one-half months after the final administrative action on his removal. The defendant officials moved to dismiss, filing in support an affidavit reciting facts which upon their face posed the problem of laches. Plaintiff filed an opposition, in which he referred to the defendants' "attempting to raise the issue of laches". The trial court entered summary judgment.

The plaintiff's case was barred by laches. The law on the point was established by *Arant* v. *Lane*[1] in 1919 and has consistently been applied by the federal courts in many cases since then.[2] The judgment of the District Court is

Affirmed.

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[1] 249 U.S. 367, 372.

[2] *E.g.*, Norris v. United States, 257 U.S. 77 (1921); Nicholas v. United States, 257 U.S. 71 (1921); Jones v. Summerfield, 105 U.S. App. D.C. 140, 265 F. 2d 124 (D.C. Cir.), *cert. denied*, 361 U.S. 841 (1959); Drown v. Higley, 100 U.S. App. D.C. 326, 244 F. 2d 774 (D.C. Cir. 1957); O'Connor v. Summerfield, 99 U.S. App. D.C. 249, 239 F. 2d 69 (D.C. Cir. 1956); Haas v. Overholser, 96 U.S. App. D.C. 22, 223 F. 2d 314 (D.C. Cir. 1955); Sawyer v. Stevens, 95 U.S. App. D.C. 267, 221 F. 2d 822 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 959 (1955); Davis v. Summerfield, 95 U.S. App. D.C. 78, 219 F. 2d 510 (D.C. Cir.), *cert. denied*, 349 U.S. 965 (1955); Grasse v. Snyder, 89 U.S. App. D.C. 352, 192 F. 2d 35 (D.C. Cir. 1951); Caswell v. Morgenthau, 69 App. D.C. 15, 98 F. 2d 296 (D.C. Cir.), *cert. denied*, 305 U.S. 596 (1938).

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